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Nos. 1085 [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1946

SAMUEL SALVADORES PERTICIARO, PETITIONER

v.

UNITED STATES OF AMERICA

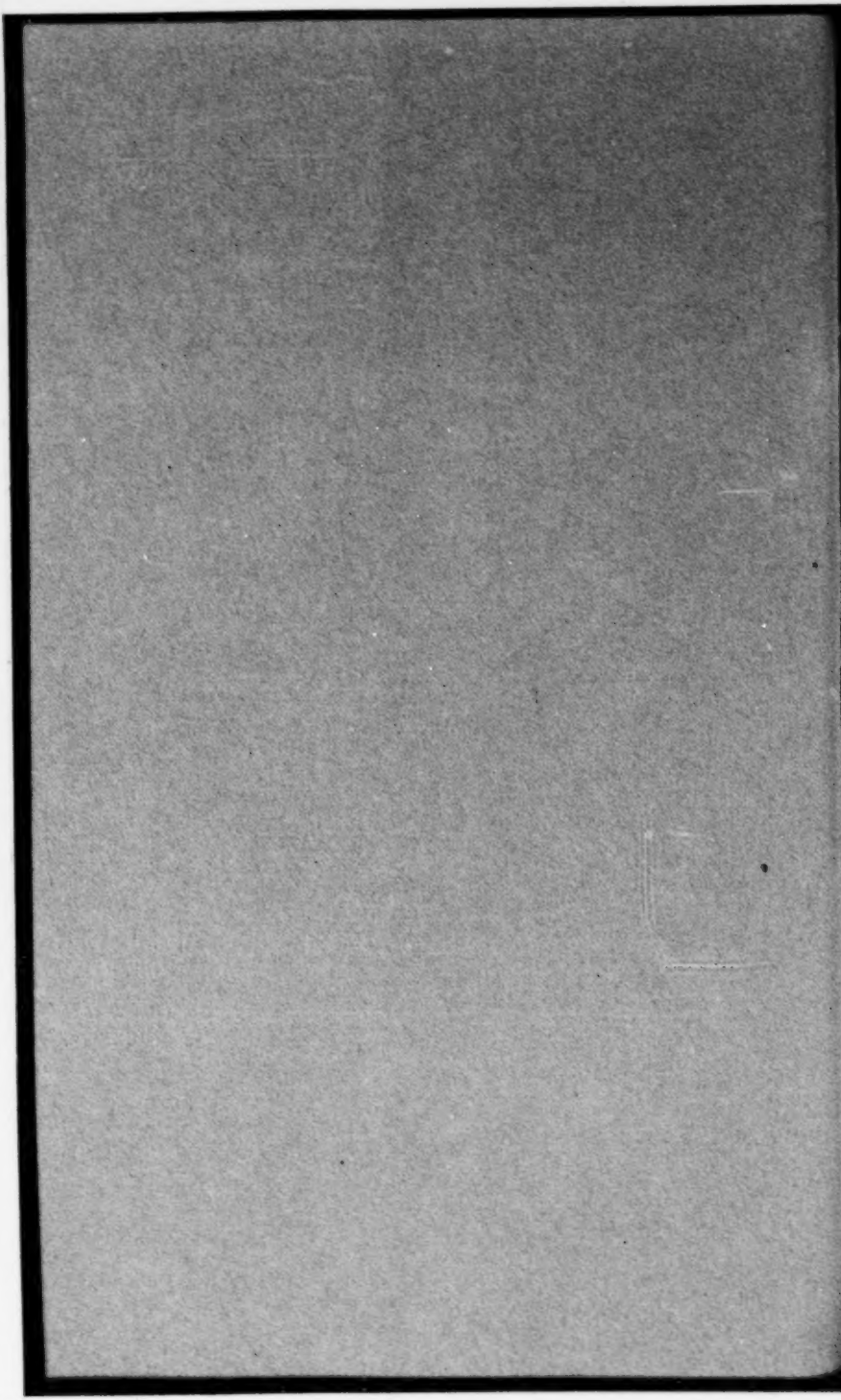
FRANK WALTER MOGALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1085

SAMUEL SALVADORE PERNICIARO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1092

FRANK WALTER MOGALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 81–82) is reported at 158 F. 2d 792.

JURISDICTION

The judgment of the circuit court of appeals was entered December 30, 1946 (R. 83), and a

joint petition for rehearing (R. 84–90) was denied February 3, 1947 (R. 91). The petitions for writs of certiorari were both filed March 3, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioners' convictions on count 8 should be reversed on the ground of inconsistency in the verdict.

2. Whether, as applied to petitioners, Section 626.1 (b) of the Selective Service Regulations, which requires that the local board be informed of any facts which "might result in the registrant being placed in a different classification", is too vague and indefinite to support a criminal prosecution and conviction for knowingly failing to comply with it.

STATUTE AND REGULATIONS INVOLVED

Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 311), provides in part:

> Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the dis-

> trict court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *

The applicable Selective Service Regulations provided as follows during the greater part of the period involved in this case:

> 622.22 Class II–B: *Necessary man in war production.* (a) In Class II–B shall be placed any registrant who is found to be a "necessary man" in war production. (8 F. R. 11346.)
>
> (b) Class II–B deferments shall be for a period of 6 months or less. If there is a change in the registrant's status during the period of deferment in Class II–B, his classification shall be reopened and considered anew. At the expiration of the period of the registrant's deferment in Class II–B, his classification shall be reopened, and he shall be classified anew. In again classifying the registrant, care should be taken not to impede the war production program. The registrant should be again classified in Class II–B for a period of 6 months or less if such classification is warranted and if the registrant's employer has made a reasonable but unsuccessful effort to secure or train a replacement for the registrant during the period of deferment. The same rule shall be applied when again classifying such a registrant at the end of each successive period for which he had

been classified in Class II–B. (6 F. R. 6607.[1]

* * * * *

622.24. *"Necessary man" defined.* A registrant shall be considered a "necessary man" in war production or in support of the war effort, including training and preparation therefor, only when all of these conditions exist: (1) He is, or but for a seasonal or temporary interruption would be, engaged in war production or in support of the war effort; (2) his removal would cause a serious loss of effectiveness therein; and (3) he cannot be replaced. (8 F. R. 11346.)[2]

* * * * *

626.1. *Classification not Permanent.* (a) No classification is permanent. * * *

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[1] Subsection (b) was amended on April 20, 1944 (9 F. R. 4385), to read as follows:

"(b) In Class II–B shall be placed any registrant who by reason of his occupation is found to be 'making a contribution' to war production and who is:

"(1) Age 38 or over, or

"(2) Age 18 through 37, and

"(i) Who is found to be qualified for limited military service only, or

"(ii) Who is found to be disqualified for any military service. (This shall be deemed to include every registrant who would be placed in Class I–C, Class IV–C, or in Class IV–F if it were not for the fact that he qualifies for classification in Class II–B under the provisions of this section.)"

[2] On April 20, 1944, this Section was amended (9 F. R. 4385), as follows:

"622.24 *'Necessary man' defined.* A registrant shall be considered a 'necessary man' only when all of these condi-

> (b) Each classified registrant shall, within 10 days after it occurs, * * * report to the local board in writing any fact that might result in the registrant being placed in a different classification. (6 F. R. 6843.)

STATEMENT

On July 26, 1945, an eight-count indictment was filed in the District Court for the Eastern District of Louisiana, charging (counts 2–8) that petitioners violated Section 11 of the Selective Training and Service Act and regulations promulgated thereunder, in connection with the registration of petitioner Perniciaro, and (count 1) that they conspired to do so (R. 3–28). After a jury trial, both petitioners were acquitted on counts 1 through 7, but found guilty on count 8 (R. 32, 57). Thereafter the trial court sentenced Perniciaro to imprisonment for four years (R. 68–69) and Mogall to imprisonment for two years and to pay a fine of $500 (R. 69–70). On appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed (R. 83).

Petitioners have not caused the evidence which was adduced at their trial to be incorporated in

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tions exist: (1) He is, or but for a seasonal or temporary interruption would be, engaged in war production or in support of the war effort; (2) his removal would cause a serious loss of effectiveness therein; (3) he cannot be replaced; and (4) he meets such other conditions and qualifications as may be prescribed from time to time by the Director of Selective Service."

the record on appeal. Accordingly, the following facts asserted in count 8 of the indictment (R. 25–28) must be taken as true:

Perniciaro was employed at the Delta Shipbuilding Company, New Orleans, Louisiana, from June 15, 1942, to January 31, 1945. Mogall was the superintendent of the pipe department to which Perniciaro was assigned. The records of the company ostensibly showed that Perniciaro worked regularly at the company's yard an average of 48 hours per week, whereas in fact he merely pretended to work, by checking in and out at the yard as the company's time cards showed, and loafed or slept on the job and disappeared during his ostensible working hours. Petitioners knowingly failed to report to Local Board No. 8, New Orleans, with which Perniciaro was registered, the foregoing facts or the fact that Perniciaro was not, as ostensibly shown by the company records, actually performing any useful work in support of the war effort during the period in question.

ARGUMENT

1. Petitioner Mogall contends that the verdict on count 8 is so wholly inconsistent with and repugnant to the acquittal on counts 1 through 7 of the indictment, that his conviction on count 8 is void (Pet. 5–12). But the law is that "Each count in an indictment is regarded as if it was a separate indictment." *Dunn* v. *United States*, 284 U. S. 390, 393. See also, *e. g.*, *Crespo* v.

United States, 151 F. 2d 44, 45 (C. C. A. 1), certiorari dismissed, 327 U. S. 758; *United States* v. *Albers,* 115 F. 2d 833, 836 (C. C. A. 2); *Williams* v. *United States,* 151 F. 2d 736, 737 (C. C. A. 4); *Murphy* v. *United States,* 133 F. 2d 622, 627 (C. C. A. 6); *Downing* v. *United States,* 157 F. 2d 738 (C. C. A. 8). Consequently, as those cases indicate, the verdict on count 8 need not have been consistent with that on the other counts of the indictment.

However, even if inconsistency in a verdict were a basis for challenging a conviction, the asserted inconsistency here cannot be assumed in the absence of the evidence at the trial (see opinion below at R. 82). Cf. *United States* v. *Dunbar,* 149 F. 2d 151 (C. C. A. 7), certiorari denied, 325 U. S. 889; *Miller* v. *United States,* 125 F. 2d 517, 519 (C. C. A. 6), certiorari denied, 316 U. S. 687; *United States* v. *Twentieth Century Bus Operators,* 101 F. 2d 700, 702 (C. C. A. 2), certiorari denied, 307 U. S. 624. A complete record might show that the jury's action on the different counts can be reconciled. For example, the acquittal on count 1 might have resulted from a failure of proof of the required conspiratorial elements. Similarly, the proof on counts 2 through 7 may not have satisfied the jury that Perniciaro knew anything about the letters which Mogall was charged with having sent the draft board, or that Mogall wrote or mailed the letters. It does not necessarily follow that there

was insufficient proof of petitioners' knowledge of the facts asserted in count 8 or of their wilful omission to perform the affirmative act of notifying Perniciaro's draft board of these facts.

2. Petitioner Perniciaro contends that Section 626.1 (b) of the Selective Service Regulations (*supra*, p. 5), upon which count 8 of the indictment is predicated,[3] creates so vague, indefinite, and uncertain a standard of responsibility that it cannot constitutionally support his conviction for failing to inform the local draft board of the facts asserted in that count (Pet. 7–8, 11–16).

It is questionable whether this contention can now be advanced since petitioners did not assert it in the trial court or seasonably in the court below.[4] Cf. *Yakus* v. *United States*, 321 U. S. 414, 444–448. In any event, there is no merit in this contention. Precisely the same question was raised in the case of *Stassi* v. *United States*, 152 F. 2d 581, certiorari denied, 328 U. S. 842, in

[3] Section 11 of the Selective Training and Service Act, set forth *supra*, pp. 2–3, makes it an offense, *inter alia*, knowingly to fail to perform a duty required by the Selective Service Regulations.

[4] The record does not show that petitioners demurred to the indictment or requested instructions to the jury presenting the question now sought to be raised. They moved for a new trial (R. 59–66) and in arrest of judgment (R. 66–67), but both motions were confined to the asserted inconsistency of the verdicts. The Grounds of Appeal (R. 77) and Assignments of Errors (R. 77–78), as well as the original submission below (R. 82), were similarly limited, and the question now urged was first presented in the petition for rehearing below (R. 84, 87–89).

which the Fifth Circuit held that the selective service regulation was not, as claimed, too vague, indefinite, and uncertain to support the conviction there. As we pointed out in our brief in opposition in that case (No. 971, Oct. T. 1945), Section 626.1 (b), rather than enumerating every fact of which a registrant is required to inform his local board, which would not be feasible because it would require extensive detail, is expressed in terms which must be applied to specific factual situations. And, while conceivably there may be hypothetical cases where the regulation might be so vague in its application as to preclude criminal prosecution, that possibility should not affect those situations where there is no occasion for speculation. In the instant case, there can be no doubt that if the draft board had been notified that Perniciaro, while ostensibly working full time in the ship yard, was actually merely checking in and out and loafing on the job or pursuing his own devices, it would have taken away from him his then existing "necessary man" classification (see Selective Service Regulations 622.22 and 622.24, *supra,* pp. 3–4). Consequently, as in the comparable circumstances of the *Stassi* case, we submit that the applicability of Selective Service Regulation 626.1 (b) to petitioners was not speculative, and that therefore the contention that it is too vague and uncertain to support their convictions is without merit.

CONCLUSION

The judgment below is clearly correct, and there is no conflict. We therefore respectfully submit that the petitions should be denied.

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